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No. 99-1030

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IN THE

Supreme Court of the United States

CITY OF INDIANAPOLIS, INDIANA, AND
BART PETERSON, IN HIS OFFICIAL CAPACITY AS
MAYOR OF THE CITY OF INDIANAPOLIS, INDIANA,
Petitioners,

v.

JAMES EDMOND AND JOELL PALMER,
ON THEIR OWN BEHALF AND ON BEHALF OF
A CLASS OF THOSE SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents divide Fourth Amendment jurisprudence into two neat parts based on the government's state of mind. According to respondents, searches and seizures that the government conducts primarily for criminal-investigatory purposes invariably must be supported by cause, while searches and seizures that the government conducts primarily for non-criminal-investigatory purposes in some circumstances may be pursued without cause. Resp. Br. 11, 20-21. As a threshold matter, respondents' criminal/non-

criminal distinction finds no home in the text of the Fourth Amendment. And although this case is about automobile-checkpoint seizures, respondents construct their binary model based on search cases within the "special needs" doctrine. Thus, respondents examine regulatory-search, inventory-search, and drug-testing-search cases (*id.* at 11-16), and then strain to square those unrelated cases with the precedents relevant here—*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), and *Brown v. Texas*, 443 U.S. 47 (1979). Resp. Br. 16-25. Respondents' global Fourth Amendment theory fails because *Martinez-Fuerte* and *Sitz* establish definitively that police may conduct automobile checkpoints for criminal-investigatory purposes.

Equally unsound is respondents' argument that the Court should disregard the City's other checkpoint justifications (checking licenses, registrations, and for impairment) because the City's "dominant purpose" is to interdict drugs. Resp. Br. 34-37 n.12. The City's alternative justifications are indisputably legitimate, and respondents concede that courts will sometimes find it "impossible" to determine whether criminal-investigatory interests supply the "dominant purpose" behind checkpoints ostensibly conducted for other purposes. *Id.* at 37 n.12. The test respondents offer to evaluate these "impossible" situations demonstrates what the City has explained in this case: the constitutionality of a police checkpoint does not turn on the government's motivation.

ARGUMENT

I

1. *Martinez-Fuerte* and *Sitz* cannot be recast as special-needs or administrative-search cases. Contrary to respondents' assertions, *Martinez-Fuerte* did not decide to apply a balancing test to checkpoint stops based on Congress's power over immigration and border controls. The

Court nowhere even mentioned the checkpoints' border- and immigration-control purposes as justifications for applying a balancing test. In noting that the government's interests were "legitimate and in the public interest," the Court merely was balancing the interests at stake. *Martinez-Fuerte*, 528 U.S. at 562. And in deciding to apply a balancing test to the checkpoints, the Court appropriately focused on motorists' reduced expectations of freedom of movement and privacy in their automobiles, not on Congress's power over immigration and border controls. *Id.* at 561. Governments at all levels subject motorists to detailed regulations and limits. For example, the government forces motorists to stop at railroad crossings, stoplights and stop signs, and the police stop cars at checkpoints to search for fugitives and missing persons. All motorists, not merely those crossing international borders, have reduced expectations of freedom of movement and privacy.

Further, that *Martinez-Fuerte* characterized immigration-control checkpoints as "legitimate and in the public interest" hardly signals a special Fourth Amendment status not applicable to checkpoints that state and local governments employ for other sound reasons. For example, *Sitz* approved a state's sobriety checkpoints, thus proving that Congress's immigration- and border-control powers are not special in this regard. And while *Torres v. Puerto Rico*, 442 U.S. 465, 472-73 (1979), confirms the unremarkable proposition that immigration- and border-control powers reside only with the federal government, states and cities have general police powers that allow them to enact narcotics and traffic-safety laws and to establish checkpoints to enforce them. Those local powers are on equal Fourth Amendment footing with Congress's border-control powers. But under respondents' theory, the Border Patrol could operate a checkpoint in Detroit (which, like the checkpoint in *Martinez-Fuerte*, is within 100 miles of an international border) using trained dogs to sniff contraband, but the Detroit police would be

precluded from operating the same checkpoint in the same location using the same minimally intrusive techniques.

Similarly, in deciding to apply *Brown* balancing, *Sitz* did not rely on, or even mention, any "non-criminal investigatory purpose." Resp. Br. 22. Rather, *Sitz* acknowledged that at least two people had been arrested at Michigan's sobriety checkpoints (*Sitz*, 496 U.S. at 448), and in applying *Brown* the Court referred to checkpoints as a "law enforcement technique" and as a means of "apprehending drunken drivers." *Id.* at 453. Respondents acknowledge (as they must) that *Sitz* expressly eschewed reference to "special needs"—*i.e.*, non-criminal-investigatory needs—to justify applying *Brown*. Resp. Br. 23. Consequently, contrary to respondents' assertion, *Sitz* did indeed "authorize police stops which are designed solely or primarily for purposes of normal police investigation" (*id.*), so long as such stops pass *Brown* balancing.[1]

Equally unhelpful is respondents' argument that the Court's decision to apply a balancing test to immigration and

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[1] The Court in *Sitz* was confronted with, and rejected, the very argument that respondents advance here—that criminal-investigatory checkpoints should be treated differently from other kinds of checkpoints. Indeed, the position of the American Civil Liberties Union (co-counsel for respondents) in this case that sobriety checks are *not* for the purpose of criminal investigation marks a dramatic departure from the position it took on behalf of respondents in *Sitz*, where it argued that "the seizure of motorists under the Michigan State Police sobriety roadblock is designed to serve only one purpose—the enforcement of criminal laws against drunk driving. Such roadblocks are instituted to detect and arrest intoxicated drivers. Quite clearly, these roadblocks serve no special need, 'beyond the normal need for law enforcement.'" *Sitz* Resp. Br. 11. The Court agreed and applied *Brown v. Texas*, 443 U.S. 47, 50-51 (1979) (which supplies a criminal investigation standard), rather than *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (which supplies a "special needs" standard). *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449-50 (1990).

sobriety checkpoints may be justified because "criminal prosecution is not the principal or ultimate goal of the program." Resp. Br. 17. To say that prosecution for smuggling illegal aliens furthers the government's public-policy goal of curbing illegal immigration, or that prosecution for drunk driving furthers the government's public-policy goal of preventing accidents, does not distinguish these prosecutions from any other. Just as "[t]he need to keep imminently unsafe drivers off the road is a non-criminal investigatory interest" (*id.* at 22), so too is the need to keep imminently unsafe narcotics off the street a non-criminal-investigatory interest. And just as "interdicting the flow of illegal entrants" into the United States before illegal aliens reach large labor markets serves "the public interest" (*Martinez-Fuerte*, 428 U.S. at 552, 562), so too does interdicting the flow of illegal narcotics before the drugs reach consumer markets serve the larger public interest. Whenever the government pursues an investigation to enforce the law—criminal or civil—the government furthers its interest in protecting the health, safety and welfare of the citizenry. That is why the underlying public policy promoted by the checkpoints played no part in the Court's decisions to employ Fourth Amendment balancing tests in *Martinez-Fuerte* and *Sitz*.

2. To make their theory work, respondents also recast *Brown v. Texas*, 443 U.S. 47 (1979). Respondents assert that *Brown* balancing applies only in non-criminal-investigatory cases, such as administrative- and regulatory-search and seizure cases. Resp. Br. 20. But *Brown* itself was a criminal investigation case. *See Brown*, 443 U.S. at 48-49. And in articulating the Fourth Amendment balancing test, *Brown* specifically contemplated seizures in the criminal-investigatory context, stating, "[t]he reasonableness of seizures that are less intrusive than a traditional arrest *** depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary

interference by law officers.'" *Brown*, 443 U.S. at 50 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). The Court subsequently has applied *Brown* balancing only in criminal-investigatory contexts. In *Sitz*, the Court applied it to sobriety checkpoints designed to detect criminal conduct. 496 U.S. at 453. And in *Rawlings v. Kentucky*, 448 U.S. 98, 110 n.5 (1980), the Court cited *Brown* balancing as the proper standard where the police "temporarily detain[] a person at the scene of suspected drug activity to secure a search warrant . . . ." *See also United States v. Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (applying *Brown* balancing to DEA officers' stop of an airline passenger for the purpose of investigating drug trafficking).

Meanwhile, in non-criminal-investigatory, or "special needs," cases, the Court has never relied on *Brown*. In *New Jersey v. T.L.O.*, where Justice Blackmun characterized administrative-search cases as presenting "special needs, beyond the normal need for law enforcement," neither the Court nor Justice Blackmun cited *Brown* in deciding to use a balancing test to review a school principal's search of a student's purse. 469 U.S. 325, 337, 351 (1985). Likewise, the Court has not cited *Brown* in cases reviewing government inspections of closely regulated businesses or in cases reviewing drug-testing programs. *See New York v. Burger*, 482 U.S. 691, 702-04 (1987); *Donovan v. Dewey*, 452 U.S. 594, 598-604 (1981); *Chandler v. Miller*, 520 U.S. 305, 313-20 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). *See also Griffin v. Wisconsin*, 483 U.S. 868, 873-77 (1987) (analyzing the search of a probationer's apartment under the "special needs" doctrine, and not citing *Brown*).

Nor has the Court's use of *Brown* in the criminal-investigatory context opened the door to unrestricted searches and seizures, as respondents portend. Resp. Br. 32-33. *Brown* requires an inquiry not only into the weight of the asserted governmental interest, but also into the degree of intrusion the governmental action imposes on individuals. *Brown*, 443 U.S. at 51. Like *Martinez-Fuerte* and *Sitz*, this case concerns only brief seizures of automobiles, not searches of pedestrians, who have higher expectations of freedom of movement and privacy than do motorists. Under circumstances more personally invasive than the brief seizures at issue here, the degree of intrusiveness may outweigh the government's asserted interest.

Respondents' argument that the City's checkpoints are overly intrusive (Resp. Br. 40) under *Brown* also is insupportable. The Court in *Martinez-Fuerte* and *Sitz* held that checkpoints are permissible because the obvious police presence and use of uniform procedures reduce innocent motorists' subjective fear and alarm. *Martinez-Fuerte*, 428 U.S. at 558; *Sitz*, 496 U.S. at 453. Here, the police post signs to advise motorists that they are approaching a narcotics-detection checkpoint where a "K-9" will be used and station marked cruisers near the checkpoints. Pet. App. 57a. Moreover, officers have no discretion over how to operate the checkpoints: detailed, written guidelines require officers to stop only predetermined sequences of cars and instruct officers what to say, what to observe, and what to do.[2] *Id.* at

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[2] While the IPD devotes 30 officers to each checkpoint, it is not the case, as respondents imply (Resp. Br. 42), that all 30 officers approach each car. Rather, the officers must manage numerous cars at once, and their attention is divided among various tasks, including checking licenses and registrations with motorists, using the computer to check for valid licenses and for outstanding warrants, handling the narcotics dog, and ensuring the overall safety and efficiency of the checkpoint. Had the City devoted fewer officers, the stops would have lasted longer, and

26a-27a. Thus, the City's checkpoints protect motorists from exactly the kinds of arbitrary or excessive intrusions the Court has invalidated in connection with automobile stops. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

Furthermore, respondents suggest that dog sniffs yield "uncertain" results and therefore are likely to cause motorists greater "fear and surprise." Resp. Br. 40-41. But they do not explain why the reaction of an officer concerning a driver's sobriety is likely to be more "certain" than the reaction of a narcotics-detection dog with superior olfactory capabilities and fewer distractions. *See id.* at 41. More fundamentally, the mere possibility that a dog sniff at the City's checkpoints may yield a false positive in a particular instance is not properly before the Court. "As pursued in the lower courts, the instant action challenges only the use of . . . checkpoints generally." *Sitz*, 496 U.S. at 450. This case is not about what happens *after* the stops in individual cases; any unconstitutional police or narcotics-dog conduct occurring after the stops remains subject to case-by-case judicial review. Indeed, respondents have repeatedly disclaimed any challenge to the dog sniffs in this case. Resp. Br. 41 n.14; Resp. Seventh Cir. Reply Br. 3 n.1.

II

Respondents argue that the City's additional justifications for its checkpoints—to conduct license, registration, and sobriety checks—merely amount to a disingenuous "scheme to keep drivers seized" during the dog sniff. Resp. Br. 35. They urge the Court to look behind the City's additional purposes and invalidate the checkpoints because the City also has an "overriding" drug-interdiction purpose. *Id.* at 36. But in stating that there is no evidence of the City's other

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respondents surely would have complained even more that the stops' duration renders them unreasonable.

interests, respondents ignore the record; in arguing that the Court may disregard the City's asserted interests, they contradict the Court's precedents; and in urging the Court to determine the relative priorities of municipal and law enforcement officials, they propose an impractical and elusive inquiry that they themselves do not embrace and ultimately concede to be unworkable.

1. Respondents are flatly wrong when they argue that the City is uninterested in conducting license, registration, and sobriety checks. Resp. Br. 34-38. According to the City's checkpoint guidelines, the officers' first actions are to check licenses and registrations and to "[l]ook for signs of impairment." Pet. App. 53a; *compare with Sitz*, 496 U.S. at 447 ("drivers [are] briefly examined for signs of intoxication."). Consequently, nearly half of the arrests at the checkpoints were not related to narcotics. Pet. App. 2a-3a. Based on this evidence, the district court specifically found that the City's checkpoints' "stated and actual purposes include" narcotics checks "*and* checking licenses and registrations." *Id.* at 43a-44a. Further, *Sitz* held that checking motorists' sobriety is a valid justification for a checkpoint, and *Prouse*, 440 U.S. at 658, 663, established that checking licenses and registrations vindicates a "vital" interest that can justify a checkpoint. Thus, the City need not "present some evidence that public concern over license and registration issues justifies a roadblock." Resp. Br. 37 n.11.

2. These additional interests justify the City's checkpoints, notwithstanding the City's other motivations. The central teaching of *Whren v. United States*, 517 U.S. 806, 813 (1996), is that the police may stop a motorist as long as there is a legitimate objective reason to do so, even if the officers' subjective motivations for the stop are improper. Respondents do not offer a principled explanation for why checkpoints *must* be judged based on the City's programmatic motivations while a particular seizure *may not* be judged

based on an officer's motivations. *Whren*'s rationale for insisting solely on an objective inquiry applies equally where officers have no individualized suspicion (*see Bond v. United States*, 120 S.Ct. 1462, 1465 n.2 (2000)) and instead follow the express directives of city policymakers. And while the City has admitted that drug interdiction is a principal purpose for the checkpoints, *Whren* explained that the basis for rejecting a subjective inquiry does not rest solely, "or even principally," on the difficulty of obtaining evidence of the government's intent. *Whren*, 517 U.S. at 814. Rather, the "principal basis—which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Id.* In other words, it is precisely the Fourth Amendment's concern for reasonableness—by nature an objective inquiry—that precludes judging the City's checkpoints based on the motivations behind them.

An additional problem is that, notwithstanding the City's candor in this case, respondents' methodology would require courts reviewing future checkpoints to "plumb the collective consciousness of law enforcement" (*Whren*, 517 U.S. at 815) and determine whether an improper purpose "overrides" a permissible one. Such an undertaking would be highly elusive and, indeed, more difficult than determining the subjective intent of a single law enforcement officer—a practice the Court has rejected. *Id.* Modern law enforcement programs are developed with input from multiple officials and groups and, consequently, serve multiple purposes, such as preventing crime, deterring disfavored behavior, promoting public safety, stimulating economic development, and instilling community pride.

Respondents do not propose a reliable framework (nor does one exist) for courts to consider these various interests and to

arrive at a single, overriding "programmatic purpose." Instead, they merely cite *Michigan v. Clifford*, 464 U.S. 287, 297-98 (1984), for the proposition that courts will find primary purpose "not by looking into the thought processes of those involved, but by reaching reasonable conclusions based on the evidence before the Court." Resp. Br. 36. But *Clifford* invalidated a search that occurred *after* the government had exhausted its administrative needs. *Clifford*, 464 U.S. at 297 ("Because the cause of the fire was then known, the search of the upper portions of the house . . . could *only* have been a search to gather evidence of the crime of arson.") (emphasis added); *see also Michigan v. Tyler*, 436 U.S. 499, 511-12 (1978) (invalidating fire and police officers' follow-up searches that occurred after exigency period had passed). With checkpoint stops, however, the government pursues multiple purposes simultaneously. In such circumstances, any material intrusion under the Fourth Amendment is the same regardless of purpose, and courts will find it immeasurably more difficult (and ultimately pointless) to try to determine whether an overriding improper purpose exists. For example, some police dogs are trained to detect not only drugs, but also humans and currency. United States Br. 1; *see also United States v. Wilson*, 7 F.3d 828, 832 (9th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994); *United States v. Bajakajian*, 524 U.S. 321, 324 (1998). Thus, when the Border Patrol uses a dog at a checkpoint to sniff for illegal aliens, the dog simultaneously sniffs for drugs. Irrespective of whether the Border Patrol's "dominant purpose" is to check for illegal aliens or for drugs, the Border Patrol's conduct is identical. But under respondents' theory, the government's identical conduct, which imposes the identical degree of intrusion upon motorists, will be treated differently depending upon the government's "dominant purpose."

Further, respondents do not elaborate how courts would undertake such a case-specific inquiry. In his dissent below, Judge Easterbrook warned that a checkpoint trial will be "one

at which officials of Indianapolis will testify about their motivations in approving the roadblock program, and the district judge must make credibility findings to resolve the fourth amendment objection." Pet. App. 15a. Because the City has a new mayor since the initial formulation of the checkpoint policy, this inquiry is even more complex in this case. Is the current administration stuck with the publicly stated positions of the prior administration? May the new mayor credibly disavow the prior administration's purposes while conducting the checkpoints in the exact same manner? Nor is it clear whether a judge or a jury would decide this credibility issue. But regardless who decides, respondents' theory would inevitably lead to different conclusions about identically operated checkpoints. Decisions about constitutionality would depend not on the conduct of police, but on the content of the government's press releases and public statements (here from the prior city administration). Resp. Br. 35-36.

Judge Easterbrook also pointed out the disconnection between the motivations behind checkpoint programs and the Fourth Amendment inquiry: "[I]f a dog may be added to the program sustained in *Sitz*, it can't matter to 'reasonableness' whether some of the program's sponsors thought the dog more important than the breathalyzer." Pet. App. 15a. That respondents are willing to argue here that the City is not sufficiently motivated by its asserted license-check and driver-impairment interests, despite stipulated evidence and the IPD's conduct to the contrary, demonstrates how unrelated their approach is to an objective inquiry and how muddled their alternative inquiry would be. *See* Resp. Br. 34-35.

3. Ultimately, respondents themselves recognize that the constitutionality of a checkpoint does not, contrary to their global theory, turn on the government's motivation. Respondents concede, as they must, that with mixed-motive

checkpoints it can be "impossible" to determine the government's primary purpose. Resp. Br. 37 n.12. In such cases, they assert, if the government's "criminal investigatory purposes increase the intrusiveness of the search or seizure in any way over what the government would otherwise have conducted in pursuit of its legitimate regulatory goals," the checkpoint (assuming it is conducted without cause) should be declared invalid. *Id.* Thus, respondents assert that, in "impossible" cases, the government's need for cause to conduct a search or seizure depends on the intrusiveness of the government's actions, not on the government's purpose. Respondents' "impossibility" test highlights the incurable defects in their global theory, and this new twist is inconsistent with precedent and unworkable.

As an initial matter, respondents' novel proposal amounts to a back-door method of invalidating law enforcement practices the Court has long approved under the Fourth Amendment, such as minimally intrusive dog sniffs and plain-view observations. Notwithstanding the lawfulness of minimally intrusive dog sniffs (*United States v. Place*, 462 U.S. 696, 707 (1983)), under respondents' theory they presumably would be invalid (absent cause) because of what they supposedly reveal about the government's motivations. Similarly, though *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), upheld a maritime document-inspection stop where "visual inspection of the [vessel] is limited to what can be seen without a search" (*id.* at 592, quoting *Martinez-Fuerte*, 428 U.S. at 558), including an officer's peering through an open hatch (*id.* at 583), under respondents' theory, this non-search "visual inspection" would invalidate the stop because it was "intrusive to some degree" (*id.* at 592) and was attributable only to a criminal-investigatory purpose (*see id.* at 583). Respondents' theory would, in short, require overruling *Place*'s holding that a minimally intrusive dog sniff is not subject to Fourth Amendment review, as well as *Villamonte-Marquez* and possibly other precedents. *See,*

e.g., *Texas v. Brown*, 460 U.S. 730, 739-40 (1983) (plurality opinion of Rehnquist, J.) (stating that an officer's shining a flashlight into a car stopped at a license checkpoint and shifting his position to gain a better view for criminal investigation purposes are not subject to challenge under the Fourth Amendment); *Martinez-Fuerte*, 428 U.S. at 558 (upholding an automobile checkpoint where "visual inspection of the vehicle is limited to what can be seen without a search.").

Furthermore, respondents' "impossibility" test is sure to yield inconsistent results. The precise circumstances where a court would find it "impossible" to discern the government's primary purpose for a search or seizure are undefined and, more likely, undefinable. Does "impossibility" arise merely where there is "some evidence [of] public concern" (Resp. Br. 37 n.11) related to the asserted regulatory interest? Or is there a way to prioritize conflicting evidence that resolves the dilemma, *i.e.*, does the mayor's word count more than the police chief's? Nor do respondents state whether "impossibility" is a matter for a jury or a judge to decide, or, if a jury is to determine "impossibility," whether the trial would be bifurcated for an initial "impossibility" determination. As with respondents' more general inquiry into programmatic purpose, these lingering questions would inevitably lead to disparate treatment of identical checkpoints, and they show how far removed respondents' theory is from the inquiry into reasonableness established in *Martinez-Fuerte*, *Sitz*, *Brown* and *Whren*.

* * * *

"It is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring). Respondents propose such a Grand Unified Theory of the Fourth Amendment in this case,

one that would resolve all Fourth Amendment cases based on whether criminal investigation is the primary purpose for police conduct. However, "the same constitutional principle may operate very differently in different contexts * * * [a]nd setting forth a unitary test for a broad set of cases may sometimes do more harm than good." *Id.* In this case, respondents' Grand Unified Theory crumbles as soon as it is applied. To focus on the government's primary purpose would enmesh the Court in second-guessing the motivations of municipal leaders and police officers and would contradict *Martinez-Fuerte*, *Sitz*, *Brown* and *Whren*. The Court instead should reaffirm those cases and uphold the City's checkpoints.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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